No. 18-9359

IN THE
Supreme Court of the United States

EMMANUEL DIAZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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September 20, 2019

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REPLY TO BRIEF IN OPPOSITION

Telephone conversations with family members and friends are indispensable to a prisoner's life in prison. Respondent's position is that because the recording of those conversations by the New York City Department of Correction ("DOC") is reasonably related to legitimate penological interests, the district attorney may search them for inculpatory evidence in a pending case. Denying prisoner's any Fourth Amendment protection and allowing expansive warrantless searches of the recordings by prosecutors absent any prison-related need, and without consent ignores the limits of the third-party exception to the warrant requirement. Because the issues involved have been thoroughly litigated in the lower courts, the Court's review is warranted in this case.

There exists considerable confusion about the Fourth Amendment rights retained by prisoners in contexts other than prison security. For example, the Court of Appeals for the Second Circuit, in United States v. Cohen, 796 F.2d 20, 23 (2d Cir. 1986), cert. denied, 479 U.S. 854 (1986) and cert. denied sub. nom. Barr v. United States, 479 U.S. 1055 (1987), considered whether a pretrial detainee retained rights under the Fourth Amendment against a search of papers in his cell initiated by an Assistant United States Attorney looking for evidence to support a superseding indictment. In answering that question, the Second Circuit surveyed the Court's prison cases and concluded "that when a prison restriction infringes

upon a specific constitutional guarantee, it should be evaluated in light of institutional security." Cohen, 796 F.2d at 22. The Second Circuit held that the defendant's Fourth Amendment rights were violated when prison officials searched his cell because the search "was initiated by the prosecution, not prison officials" and not "even colorably motivated by institutional security concerns" but "intended solely to bolster the prosecution's case." Id. In direct conflict with the New York Court of Appeals in its decision below, the Second Circuit rejected the government's argument that "a pre-trial detainee retains no Fourth Amendment rights, regardless of the circumstances underlying the search," concluding instead that he or she is protected against searches "at the instigation of non-prison officials for non-institutional security related reasons." Id. at 23, 24. The Second Circuit explained

> The emphasis on the need to accommodate individual rights to what is recognized as legitimate penological objectives is the dominant theme throughout the Supreme Court's writing on this subject. From this it is patent that since no wall of steel and stone separates prisoners from the Constitution, prisoners' rights continue to exist. It is the scope of these rights that is necessarily limited by the broad authority prison officials must have to ensure institutional security; obviously the creation of a limitation or condition on the exercise of constitutional rights is essential to orderly prison administration. Yet, because conditioning the exercise of such rights rests on the twin-rationale of objective administrators insuring prison security, a limitation imposed on prisoners' constitutional rights cannot stand when the objectives the rationale serves are absent. Id. at 23-24 (emphasis in original). Cf. Willis v. Artuz, 301 F.3d 65 (2d Cir. 2002) (limiting Cohen exception to pretrial detainees, not convicted prisoners).

Other courts have subsequently cited the Second Circuit for this conclusion. See, e.g., United States v. Hogan, 539 F.3d 916, 923 (8th Cir. 2008) (Cohen exception "does not apply here, as the search of Hogan's cell was instigated by jail officials for security reasons and was not intended solely to bolster the prosecution's case"); United States v. Reece, 28 F.3d 114 (10th Cir. 1994) (stating that "[b]ecause Mr. Reece is not a pretrial detainee, he is not entitled to [the Cohen] exception on this basis"); Cotterman v. Creel, No. 4:14CV642-MW/CAS, 2015 WL 7003425, at *10 (N.D. Fla. Oct. 19, 2015), report and recommendation adopted, No. 4:14CV642-MW/CAS, 2015 WL 7313397 (N.D. Fla. Nov. 19, 2015) ("[a]bsent a valid security concern, a pretrial detainee's constitutional rights remain in place"); Reid–Douglas v. Harding, No. 1:10–CV–2049, 2014 WL 3507292, at *7–9 (M.D.Pa. July 14, 2014) (affirming validity of Fourth Amendment claim for cell search of pretrial detainee, but granting qualified immunity because that constitutional right was not clearly established at the time of the search); United States v. Graham, No. 12-10266-NMG, 2013 WL 5603946 (D. Mass. Oct. 8, 2013) (Cohen does not apply where "search of defendant's phone calls was initiated and executed by [prison] officials, and not by prosecutors"); Georgia v. Henderson, 271 Ga. 264, 266-268 (Ga. 1999) (concluding that pre-trial detainees are not deprived of all Fourth Amendment protections, citing, inter alia, Cohen); McCoy v. Florida, 639 So.2d 163, 166 (Fla. Dist. Ct. App. 1994) (applying Cohen to suppress evidence recovered during search of

pretrial detainee's cell at the behest of assistant state attorney prosecuting case); United States v. Colbert, No. CRIM. 89–310, 1990 WL 5200, at *3 (D.N.J. Jan. 23, 1990) (concluding that warrantless search of pretrial detainee's cell that was initiated by Postal Inspectors did not meet the Cohen exception because it was undertaken "to further legitimate objectives of the jail").[1]

As respondent correctly points out, however, many courts, have upheld searches that were conducted for prison security reasons on the grounds that prisoners had consented to the recording of those conversations. See, e.g., United States v. Gangi, 57 Fed. Appx. 809 (10th Cir. 2003); United States v. Friedman, 300 F.3d 111 (2d Cir. 2002); United States v. Eggleston, 165 F.3d 624 (8th Cir. 1999); United States v. Van Poyck, 77 F.3d 285 (9th Cir. 1996); Kansas v. Gilliland, 294 Kan. 519 (Kan. 2012); In re Grand Jury Subpoena, 454 Mass. 685 (Mass. 2009); Jackson v. State, 18 So. 3d 1016 (Fla. 2009); Decay v. Arkansas, 2009 Ark. 566 (Ark. 2009); Preston v. Georgia, 282 Ga. 210 (Ga. 2007).

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[1] While respondent contends that Stroud v. United States, 251 U.S. 15 (1919) and State v. Archie, 148 Wash. App. 198 (Ct. App. Wa. 2009) are controlling, neither case actually supports its position. Brief in Opposition at 23, 26. Stroud involved prison officials giving the district attorney a letter from an inmate admitting to killing a prison guard for security purposes, not the district attorney initiating a search of the inmate's letters to uncover evidence in an ongoing prosecution. Archie, was a decision considering only whether recording and/or monitoring of a pretrial detainee's telephone recordings by prison officials in the first instance was constitutional, not whether a subsequent search by the prosecutor of those recordings was lawful.

In this case the analysis is focused on the lawfulness of the search by the district attorney of already-recorded prisoner conversations, not the lawfulness of the recordings. Respondent's argument that Cohen is distinguishable because the recording of inmate telephone calls by DOC did not occur at the behest of the district attorney misses the mark. Brief in Opposition at 18. As respondent concedes, the DOC automatically records all non-privileged inmate telephone conversations, but staff members listen to the recordings on a "need" basis only, prompted by, for example, "escape plans," "criminal activity," a "disturbance," or "corruption by staff," and only after receiving authorization from prison management. See Brief in Opposition at 6, n.2; Pet. App. F at 87a-92a, §§ II(A), III(A)-(B).

The record in this case was absolutely silent as to whether DOC agents had listened to petitioner's calls, or even considered him a security risk, before turning the recordings over to the district attorney. Brief in Opposition at 30. On this record, knowledge about petitioner's incriminating statements was based entirely on staff from the district attorney's office listening to the recordings of his telephone calls in pursuit of inculpatory evidence, and their admission of the recordings at trial, thus, violated the Fourth Amendment (Brief in Opposition at 24-25).

Respondent suggests an exception to the warrant requirement because prison officials are "closely associated" with prosecutors. Brief in Opposition at 31. But regardless of their relationship, a prosecutor's search through

data acquired by a state administrative agency is subject to Fourth Amendment scrutiny. See Mancusi v. DeForte, 392 U.S. 364, 372 (1968) (district attorney's direction for state officials to search union employee's shared office space unlawful absent a warrant or recognized exception to the Fourth Amendment). A district attorney cannot simply bypass the warrant requirement by having prison officials turn over recordings of an inmate's telephone calls and search them for prosecutorial evidence. Such a search is unreasonable under the Fourth Amendment.[2]

Respondent's criticism of United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990) fails for this reason. Brief in Opposition at 18-19. In Noriega, the Eleventh Circuit recognized that while it is not "unreasonable to condition the use of telephones by penal inmates on monitoring of the telephone calls by the authorities charged with maintaining the security of the penal facility," the "possession of such communications by one element of the government does not necessarily implicate another element." Id. at 1511, n.10. See also Massachusetts v. Buccella, 434 Mass. 473, 485 (Mass. 2001) ("It would appear reasonable to expect that a government agency, to which a citizen is required to submit certain materials, will use those materials solely

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[2] Respondent's reliance on intermediary appellate New York court decisions (Brief in Opposition at 32, n. 7) ignores that the New York Court of Appeals explicitly rejected that the DOC "serve[d] as an agent of the State when it record[ed] the calls it turned over to the District Attorney's Office." People v. Johnson, 27 N.Y.3d 199, 206 (2016), because "the [DOC] itself is, in most respects, an administrative rather than a law enforcement agency." People v. Howard, 87 N.Y.2d 940, 941 (1996).

for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes").

There is a "major distinction between prison authorities having access to prisoners' phone calls for purposes of prison security and discipline, and the prosecutors of that pretrial prisoner having the same access for purposes of gaining advance knowledge of the pretrial prisoner's trial strategy and potential witnesses." United States v. Mitan, 2009 WL 3081727, *4, 2009 U.S. Dist LEXIS 88886, *11 (E.D. Pa., Sept. 25, 2009). Respondent's attempt to undermine that fundamental principle by emphasizing that the defendant in Mitan was acting as his own attorney is unavailing. Petitioner's inculpatory statements played at his trial were excised from recordings of conversations he had with his father and a friend in the days immediately after his arrest, when petitioner had not yet met with an attorney, but was focused on figuring out whether his family's financial resources would permit him to both retain counsel and to post bail.

By providing inmates with notice, DOC plainly recognized that pretrial detainees retained at least a circumscribed privacy interest in their telecommunications requiring consent for the recording and/or monitoring. That notice did not, however, create informed consent authorizing the district attorney to cull the recordings for non-penological purposes. Petitioner was not informed that the prosecution could access the recordings of his conversations. Because petitioner's limited consent to surveillance of his

telephone calls by DOC was expressly bound to prison safety and security (Pet. 4; Pet. App. A at 19a; Pet. App. C at 41a; Pet. App. E at 74a, 76a; Pet. App. F at 94a-95a), his "implied consent" cannot have been so open-ended as to encompass the search the district attorney conducted in this case. See Florida v. Jardines, 569 U.S. 1, 9 (2013) (consent "express or implied - is limited not only to a particular area but also to a specific purpose"); Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("[t]he scope of a search is generally defined by its expressed object").[3]

Respondent further maintains that because petitioner assumed the risk of being overheard when he used the institutional telephones, he forfeited all privacy rights he may otherwise have retained. Brief in Opposition at 25-30. But in Katz v. United States, 389 U.S. 347, 355 (1967), the Court concluded that government agents had engaged in an unlawful search by affixing an electronic listening device to the exterior of a public phone booth, notwithstanding that the user could be overheard when speaking into the handset. Id. at 359; Brief for the Respondent, Katz v.

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[3] That, sometime after petitioner's trial, DOC decided to amend the notices to include a reference to law enforcement's potential review of the recordings in no way diminishes the significance of this case. Brief in Opposition at 10, n. 3; 27, n. 6. To the contrary, it only recognizes the serious privacy concerns at stake. Prisons across the country continue to use wording substantively similar to what petitioner confronted at Rikers Island Correctional Facility as he awaited trial unable to make bail on the charges in this case. See, e.g., U.S. Dept. of Justice, Fed. Bureau of Prison, Form BP-A0407, Acknowledgment of Inmate, available at https://www.bop.gov/policy/forms/BP_A0407.pdf; Cal. Code Regs. Tit. 15, § 3282(f) (2019); Fla. Stat. Ann. § 944.151(10)(a) (2017); 37 Pa. Code § 95.233a(2) (2009).

United States, 389 U.S. 347 (1967) No. 35, 1967 WL 113606, at *15, 16 (arguing that telephone call placed from "[a] row of public telephone booths" was not entitled to Fourth Amendment protection because of risk of being overheard).

The Court in Katz, 389 U.S. at 352, recognized that the user of a public telephone is "entitled to assume that the words he utter[ed] into the mouthpiece w[ould] not be broadcast to the world" despite the capacity of the telephone company to monitor and record the calls. Smith v. Maryland, 442 U.S. 735, 746 (1979) (Stewart, J. dissenting) (noting in connection with Katz that "[a] telephone call simply cannot be made without the use of telephone company property and without payment to the company for the service. The telephone conversation itself must be electronically transmitted by telephone equipment, and may be recorded or overheard by the use of other company equipment"); Bubis v. United States, 384 F.2d 643, 648 (9th Cir. 1967) (explaining telephone companies in 1960s had both the ability and right to monitor calls when reasonably necessary to "protect themselves and their properties against the improper and illegal use of their facilities). Because, like in Katz, petitioner's telephone calls could not be made without the use of DOC's property and he could not avoid being recorded, any risk that petitioner could be overheard or that DOC would listen to the calls for security purposes did not altogether extinguish the privacy of his conversations. Brief in Opposition at 24-25. More so than elsewhere, in

prison (Pet. 20), "knowing about a risk doesn't mean you assume responsibility for it." Carpenter v. United States, -- U.S. --, 138 S.Ct. 2206, 2263 (2018) (Gorsuch, J., dissenting) (citing Epstein, Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations, 24 Berkely Tech. L.J. 1199, 1204 (2009) & W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 490 (5th ed. 1984)). See also Pet. 20.

Pretrial detainees should not be forced to choose between using institutional telephones and refraining from speaking with family members and friends. Brief in Opposition at 20, 28-29. That an inmate has a diminished privacy expectation because his telephone conversations are being recorded by a third party, here the DOC, "does not mean that the Fourth Amendment falls out of the picture entirely." Riley v. California, 573 U.S. 373, 392 (2014). To the contrary, by using the institutional telephones petitioner "in no meaningful sense" consented to a broadcast of his private conversations beyond the walls of the prison. Carpenter, -- U.S. --, 138 S.Ct. at 2220, 2228. Petitioner's entire personal life over an eight-month period was captured on the recordings and given their sensitive content it was highly unlikely that he expected them to be made public. Katz, 389 U.S. at 352 (suggesting that the Constitution must be read to account for "the vital role that the public telephone has come to play in private communication"). By accessing them, the prosecution gained the ability to not only peer deeply

into petitioner's legal strategy and financial limitations but to know his exact thoughts and feelings which gave it an unfair plea bargaining advantage as well.

This case, thus, presents "an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). Prosecutors review countless telephone recordings of incarcerated defendants, primarily because of their limited financial means, and use them to negotiate plea deals or bolster their cases at trial. The enormous amount of information gathered from defendants in this way, and the confusion surrounding privacy rights in the digital age, require resolution by this Court. See New York v. Diaz, 33 N.Y.3d 92, 117 (N.Y. 2019) (Wilson, J., dissenting) (noting that while the prosecution in this case intruded on petitioner's privacy by way of "good, old-fashioned landline surveillance it too involves modern technology that made it possible for DOC to record and store massive amounts of data and deliver more than a thousand voice recordings to the District Attorney with the click of a mouse.")

As respondent concedes (Brief in Opposition at 6, n.2), the relevant DOC Operations Order provides that copies of the recordings may be given to the district attorney offices, which would presumably be necessary to investigate criminal activity within prison walls, but otherwise treats the recordings as "confidential material, which is not to be released to the public" (see Brief in Opposition at 6, n.2; Pet. App. F at 92a, §§ III(B)(5)(a)). To

ensure their confidentiality, the Operations Orders specifies that only designated staff members are permitted to listen to them and only in designated areas, and that the discs of the recordings created for that purpose be shredded within 18 months. Pet. App. F Operations Order at 92a, §§ III(B)(2)(g), (B)(5). Not unlike the bailee, therefore, who "owes a legal duty to keep [an] item safe," an essential role performed by the DOC involves "safekeeping" the recordings. Carpenter, -- U.S. --, 138 S.Ct. at 2268, 2270 (Gorsuch, J. dissenting).

Certiorari should be granted in this case for the final reason that, as briefed by petitioner before the New York Court of Appeals, citing, inter alia, United States v. Matlock, 415 U.S. 164 (1974), Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964), it raises the important question of whether the DOC had the authority to consent to a search of the recordings by the district attorney given the lack of mutual use, joint access or control over the institutional telephones and recordings. While the DOC may have had access to and control of the recordings, any authority to search them arising from that relationship was not shared with the district attorney. Carpenter, at -- U.S. --, 138 S.Ct. at 2270-2272 (Gorsuch, J., dissenting) (urging litigants to consider whether records held by a third party are protected under the Fourth Amendment by looking to "positive law" including common law property principles).

The issue before the Court is not whether a correctional officer is permitted to disclose evidence of a threat to prison security when requesting assistance from law enforcement. Pet. 1-2. Rather, what this case requires is examination of how the Court's decisions in, among others, Turner v. Safley, 482 U.S. 95 (1987); Hudson v. Palmer, 468 U.S. 517 (1984) and Bell v. Wolfish, 441 U.S. 520 (1979), holding that prisoners retain those constitutional rights not in conflict with the legitimate security needs of the correctional facility, intersect with the Court's recent exploration of the third-party doctrine and privacy expectations in the digital age.

Limits on evidentiary searches by the prosecution in a pending case would not compromise the capacity of prison officials to protect their institutions. Brief in Opposition at 21-22. A decision in favor of the petitioner in this case would do nothing to compromise prison management and security, but it would require law enforcement to seek a warrant or rely on exigent circumstances to obtain the recordings, just as is required in other contexts. Nothing in the Court's jurisprudence justifies placing a greater value on the government's pursuit of inculpatory evidence in a pending case than on limiting the government's ability to engage in a warrantless search of telephone conversations as to which an expectation of privacy exists. See Carpenter, -- U.S. --, 138 S.Ct. at 2214 ("our cases have recognized some basic guideposts. First, that the Amendment seeks to secure the privacies of life against arbitrary power" and "[s]econd, and relatedly, that a central aim of

the Framers was to place obstacles in the way of a too permeating police surveillance) (internal quotations and citations omitted).

Petitioner did not somehow limit his Fourth Amendment claims by questioning the voluntariness of his consent, if any, and the disproportionate impact the district attorney's warrantless access to the recordings has on indigent prisoners. Indeed, the New York Court of Appeals did not rule on those issues. Diaz, 33 N.Y.3d at 100-101. That petitioner invoked due process and equal protection type arguments before a state court as he pursued his Fourth Amendment claim does not insulate this case from review by the Court. Brief in Opposition at 33-34. This case is therefore an ideal vehicle to consider the question presented.

For the foregoing reasons, and those in petitioner's initial submission, the petition for writ of certiorari should be granted.

Respectfully submitted,

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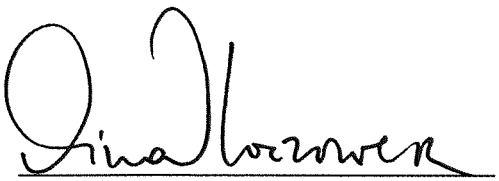

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Date: September 20, 2019